

REPORT TO THE  
UTAH LEGISLATURE

**Number 2003-10**

A Performance Audit  
of the  
Judicial Conduct Commission

December 2003

Audit Performed by:

Audit Manager	Tim Osterstock
---------------	----------------

Auditor Supervisor	Maria Stahla
--------------------	--------------

## Table of Contents

	Page
Digest .....	i
Chapter I	
Introduction .....	1
Maintaining Judicial Independence Is a Primary Concern .....	1
JCC Is the Focal Point for Judicial Complaints .....	4
Scope and Objectives .....	6
Chapter II	
Complaint Process Needs More Standardized Procedures .....	9
Wide Variety of Complaints Are Received by the JCC .....	9
Complaint Process Is in Large Part Determined by Staff Decisions .....	15
Not Publicizing JCC Sanctions Reduces JCC's Effectiveness .....	23
Recommendations .....	25
Chapter III	
Commission Actions Should Be Fair, Consistent and Accountable ...	27
Commission Decisions Should Be Well Reasoned and Documented .....	27
Lack of Guidelines Has Resulted in Inconsistent Actions .....	35
Recommendations .....	41
Chapter IV	
Supreme Court Has Role In Judicial Discipline .....	43
Supreme Court Has Not Received All Misconduct Cases From JCC .....	43

## Table of Contents (Cont.)

	Page
Supreme Court Has Not Received All Misconduct Cases From JCC .....	43
Supreme Court Guidance May Be Necessary .....	46
Recommendations .....	50
Appendix .....	53
Agency Response .....	59

# Digest of A Performance Audit of the Judicial Conduct Commission

---

**Article VIII, Section 13  
of the Utah  
Constitution grants  
the JCC broad  
authority.**

---

The Utah Judicial Conduct Commission (JCC), like conduct organizations in all states, plays an important role in the administration of judicial discipline by investigating and conducting confidential hearings regarding complaints against justices and judges. The JCC has another role—to help assure the public that judges are subject to appropriate, nonpartisan oversight of ethical conduct and thereby maintain public confidence in the system. The JCC is functioning but tends to do most of its discipline in private due to constitutional and statutory requirements for confidentiality. The high level of confidentiality has, in the past, lowered public and legislative confidence in JCC work. Several statute changes have been made since 2000 addressing some of the concerns that have been raised. The commission’s jurisdiction extends to all 392 members of the judiciary system.

The key findings and recommendations of this report include the following:

## **Complaint Process Needs More Standardized Procedures.**

Each year the Judicial Conduct Commission (JCC) receives about 100 complaints alleging judicial misconduct. JCC staff review each complaint and determine which appear to violate the Code of Judicial Conduct. Historically, this work has been done with little guidance beyond the JCC’s initial statute found in *Utah Code* 78-8. However, legislative changes and Supreme Court Decisions have helped the JCC improve its complaint review process. The current JCC director and staff are making progress in standardizing the complaint acceptance, review and presentation process. The commission and staff are also working on rules and procedures to add more structure to the process.

While all complaints are investigated to some degree, the majority of complaints filed with the Commission are dismissed for lack of evidence of judicial misconduct without notifying the judge that a complaint was filed. In 16 percent of cases, judges are asked to respond to the complaint. Based on the judges’ response, the majority of those complaints are also dismissed. District court judges receive twice the

---

**Chapter II - Complaint  
process needs more  
standardized  
procedures.**

---

number of complaints of other judges. More than half of all judges have never had a complaint filed against them and only a few judges have received multiple complaints.

Although part of the purpose of judicial discipline is to reassure the public that the judiciary does not tolerate judicial misconduct, the JCC does not publicize their actions. This is in contrast to some other states which provide extensive information to the public. In our opinion, this reduces JCC's effectiveness.

### Recommendations

1. *We recommend that the JCC and staff set standard parameters for investigations and put these parameters in their rules.*
2. *We recommend that the staff clearly write charging documents.*
3. *We recommend that the JCC and staff provide more informative dismissal letters to complainants.*
4. *We recommend that the JCC and staff set up a formal appeal process.*
5. *We recommend that staff insure all resolutions be entered into by a vote of the commission.*
6. *We recommend that JCC staff provide information to judges at training conferences regarding the types of complaints that the group is receiving.*
7. *We recommend that JCC staff make sanction decisions and annual reports available on their web site, update their office brochure and create a brochure for court personnel.*

**Commission Actions Should Be Fair, Consistent and Accountable.** Commissioners adjudicate complaints in confidential meetings based on investigations conducted by JCC staff. Then, by majority vote, determine whether or not there is judicial misconduct. If they determine that there is misconduct, the commissioners choose a disciplinary action called a sanction. Decisions regarding sanctions have been described by another states' supreme court as "collective judgement calls resting on an assessment of the individual facts of each case, as

measured against the Code of Judicial Conduct and prior precedents.” Of the 695 complaints received since 1997, the Commission has issued 17 formal, public censures and reprimands; 19 informal sanctions; nine informal resolutions; and dismissed 34 complaints with a letter of admonition, caution or comment to the judge. In addition, three judges resigned in the midst of an investigation.

Commission written decisions are unclear as to how the Commission determines which of the available sanctions to give. Article VIII, Section 13 of the *Utah Constitution* allows five available sanctions – reprimand, censure, suspension, removal, or involuntary retirement and *Utah Code* 78-8-107(2)(c) allows private reprimands. To ensure that commission decisions are consistent and fair it is important to provide commissioners with historical information and precedent so that they are able to make more informed decisions insuring that they are comparable to previous decisions made in Utah and in other states.

### Recommendations:

1. *We recommend that the commission prepare detailed written decisions that logically link factual findings and legal conclusions to the recommended sanction orders. Dissenting opinions should also be clearly documented.*
2. *We recommend that the JCC and the court determine applicable standards for determining the appropriate sanction and what is meant by a “pattern” of misconduct, whether prior informal or private resolutions of complaints may be considered in subsequent proceedings, and what weight should be accorded the judge’s record.*
3. *We recommend that the JCC and Legislature work together to establish guidelines for the use of informal reprimands.*
4. *We recommend that JCC staff enter all complaint information into a confidential database that can be used to provide relevant information to Commissioners and to the Supreme Court when requested.*

### Supreme Court Has Role In Judicial Discipline

Supreme Court review of judicial misconduct cases and imposition of discipline upon judges is required by the Utah Constitution. Prior to

2000, the Commission believed it was required to only send public reprimand orders to the Supreme Court. Many of its orders were, therefore, not forwarded to the Supreme Court for review. In our opinion, informally resolving these cases at the Commission level amounted to usurping the Supreme Court's authority to review and implement the appropriate sanction. Since May 2000, the JCC has been statutorily required to send all reprimand orders to the Supreme Court. The confidentiality of cases after the Supreme Court review depends on whether the case was resolved formally or informally by the JCC. The Supreme Court has implemented most commission orders without comment but has provided three written opinions to guide the JCC. The Supreme Court may have been hindered in performing their constitutional duty because of binding language in stipulation agreements and the lack of information provided by the JCC. These have been corrected by legislative action.

#### **Recommendations:**

- 1. We recommend that the Supreme Court consider treating sanctions against judges as it does its other decisions and make the information available on the web-site, in the court's official reporter, and in the regional reporter.*
- 2. We recommend that the Supreme Court, in imposing a sanction, consider articulating the factors leading to its decision, particularly if the court disagrees with the sanction recommended by the commission.*
- 3. We recommend that the JCC forward all misconduct cases to the Supreme Court so that the court may implement the appropriate sanction as required by the constitution.*
- 4. We recommend that the JCC not put anything in Settlement Stipulations that would bind the Supreme Court.*
- 5. We recommend that the JCC provide the Supreme Court with complete information on misconduct cases so that the court can fulfill their constitutional authority to implement, reject or modify the commission's recommended order.*

# Chapter I

## Introduction

---

Due to constitutional and statutory confidentiality provisions, most of the JCC work is done in private.

---

The Judicial Conduct Commission (JCC) plays an important constitutional role in the administration of judicial discipline by investigating and conducting confidential hearings regarding complaints against justices and judges. Just as important, the JCC has another role—to help assure the public that judges are subject to appropriate, nonpartisan oversight of ethical conduct. The JCC is functioning but tends to do most of its discipline in private due to constitutional and statutory requirements for confidentiality. Since the majority of the work done by the JCC is confidential, some JCC actions can appear vague, varied, and inconsistent. The high level of confidentiality has, in the past, lowered public and legislative confidence in JCC work. Several statute changes have been made since 2000 addressing some of the concerns that have been raised.

The goal of the judicial discipline process should be the fair and consistent application of sanctions. The sanction imposed should be appropriate to the level of culpability. In other words, the sanction should be effective judicial discipline as recommended by the commission and ordered by the Supreme Court sufficient to restore and maintain the dignity and honor of the position and to protect the public by assuring that a judge will refrain from acts of similar misconduct in the future.

### Maintaining Judicial Independence Is a Primary Concern

Judges are important public officials whose authority reaches every corner of society. Judges exercise broad control over a variety of matters in both the public and private spheres. Nearly every facet of life is affected by judicial decisions; therefore, judges should be seen as having high integrity and independence from political favor. The mold for judicial behavior has been outlined in a Code of Judicial Conduct.



---

It is important that the public and Legislature have confidence in the work of the Judicial Conduct Commission.

---

## Office of Judge is Unique

According to the Utah Judicial Council, the office of judge is unique in our society. A judge is a public servant holding an office of high public trust and so should answer to the public. However, the obligation of a judge is to resolve disputes impartially and to base decisions solely upon the facts of the case and the law. A judge, therefore, should be insulated from public pressure.

Merit selection of judges was developed as an alternative to requiring judges to run in contested elections. Contested elections were eliminated in 1985 and the retention election process was implemented. The Judicial Article of the *Utah Constitution* states “Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration.”

## Judicial Discipline Must Balance Independence and Integrity

According to the American Judicature Society (AJS), supreme courts have repeatedly stated that the purpose of judicial discipline proceedings is to preserve the integrity of the judicial system, to maintain public confidence in the system and, when necessary, to safeguard the bench and the public from those who are unfit. More specific reasons include

- Impressing upon the judge the severity and significance of the misconduct.
- Deterring similar conduct by the judge and others.
- Reassuring the public that judicial misconduct is not tolerated or condoned.
- Fostering public confidence in the system.

It is just as important for judges to have confidence in the system as it is to have public trust. Article VIII, Section 13, of the Utah Constitution recognized the statutorily created JCC and specifically mandated that the Supreme Court review all JCC findings pertaining to recommended discipline of judges. The article also requires that the court, not the JCC, enters all orders of discipline. The Legislature recognized this need for court involvement to maintain the independence of the judiciary.

The need for court involvement and its resulting direction is clear in Utah Supreme Court actions. In the *In re Worthen* opinion, the Utah Supreme Court justices stated

Our research indicates that most courts justify a particular sanction in a specific case on an ad hoc basis, that is, by comparing the conduct in the case at issue to the conduct and sanctions imposed in other cases. This ad hoc or developmental approach makes some sense given the wide variation of conduct reported in the cases. However, it tends to produce punishments that lack uniformity and consistency. . . . Consideration of the Commission's guidelines over time will help assure that such fairness is realized in Utah sooner rather than later.

### **Judges Are Subject to the Code of Judicial Conduct**

The Code of Judicial Conduct is the document to which judges and the JCC look for guidelines on what is acceptable judicial conduct. The Code of Judicial Conduct is adopted by the Utah Supreme Court from model code originally developed and revised by the American Bar Association. These standards guide all judges in Utah and throughout the United States. All Utah judges, in accepting their appointment, understand that they are subject to the Code of Judicial Conduct, which contains the following Canons or broad general principles: (The complete text of the code can be found in Appendix A.)

- Canon 1 A judge shall uphold the integrity and independence of the judiciary.
- Canon 2 A judge shall avoid impropriety and the appearance of impropriety in all activities.
- Canon 3 A judge shall perform the duties of the office impartially and diligently.
- Canon 4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
- Canon 5 A judge shall refrain from political activity inappropriate to the judicial office.

---

**The Code of Judicial Conduct provides guidelines for judicial conduct, and all judges are subject to the Code.**

---

According to a Supreme Court opinion, judges voluntarily assume the office of judge and, as such, are bound by the Code of Judicial Conduct and other laws governing judicial conduct.

## **JCC Is the Focal Point for Judicial Complaints**

Of the remedies available for addressing judicial misconduct, the JCC appears to offer the greatest benefits. JCC action is more timely and has a wider variety of disciplinary actions it can use to match a given problem. Other avenues – retention elections, impeachment, and appointing authority removal – do not have the discreet options of the JCC. Since the other options are cumbersome and severe, they are not used very often. The JCC appears to be the most effective.

### **Not All Misconduct Results in Discipline**

According to the American Bar Association’s Model Rules for Judicial Disciplinary Enforcement, “it is not intended that every transgression of the Canons and Sections of the Code of Judicial Conduct will result in the imposition of discipline.”

No two violations of the Canons are exactly alike and, certainly, not all misconduct should result in removal from office. The JCC is the only organization capable of creating a spectrum of disciplinary actions that weighs the level of violation with an appropriate level of discipline. Other systems have an all-or-nothing approach that is geared only to higher level infractions.

### **JCC Is More Effective than Retention Elections or Impeachment**

Only two judges have been removed in retention elections, one in 1994 and another in 2002. In nearly the same time frame, the JCC was involved in three investigations that resulted in three resignations. An additional six judges have retired, resigned or were not reappointed to their positions while JCC was conducting an investigation.

Although JCC action results in more judges leaving the bench, the JCC is more subtle and offers an alternative to public removal through a retention election. In the five-year audit review period, the JCC did not

---

**Some misconduct is so minor that it does not result in the imposition of discipline.**

---

---

**In the past decade, two judges have been removed in retention elections.**

---

---

**Judicial impeachment  
has rarely been used  
in Utah.**

---

recommend any removals, involuntary retirements or suspensions. However, several of the judges who were publicly censured by the JCC have resigned or retired. Confidential negotiated retirements often protect a judge's future likelihood while attempting to minimize the damage of that judge's actions. However, in doing so, the confidential agreements may harm public confidence in the judicial system.

Removal through a retention election is far more difficult. In addition, it is not as timely since retention elections are held every four to ten years depending on the type of court. County justice court judges stand for retention election every four years, district court judges stand every six years and supreme court justices stand every ten years.

The final mechanism, impeachment, has rarely been used in Utah because it is costly and considered an extreme remedy for removing a judge. Unlike other alternatives, it can also have political overtones. In 2003, the House of Representatives began impeachment proceedings against a judge but did not complete the process because the judge resigned. The JCC had finalized their process and sent an Order for Removal to the Supreme Court. According to Rule 6 of the Model Rules of Judicial Discipline:

Removal by impeachment is the least desirable method of judicial discipline. It is an all-or-nothing approach. The impeachment process is subject to political considerations and it is expensive, cumbersome and ineffective. However, the availability of impeachment as a sanction serves as a check not only upon the judiciary, but upon the judicial discipline and incapacity process as well.

### **JCC Now Provides Information to The Appointing Authority**

On misconduct cases, House Bill 285, (H.B. 285) effective May 2000, required a commission order be sent to the person or entity who appointed the judge at the same time that the order was sent to the Supreme Court. Prior to that time, no formal information went to the appointing authority.

Municipal justice court judges do not stand for retention election but instead are appointed to four-year terms by the mayor of the city. The procedure for reappointment of justice court judges and the criteria which mayors are to use in their evaluation of the judges' performance are

detailed in the Utah Code. The Judicial Council certifies judges as meeting all of the standards of judicial performance applicable to a Justice Court. Even though the Judicial Council certifies the judge, mayors sometimes decide not to reappoint them to another term of office.

## Scope and Objectives

This audit was requested by the Legislative Audit Subcommittee of the Utah Legislature. A preliminary report was issued in October 2002 entitled “A Review of the Judicial Conduct Commission (Report #2002-06). This report is a more in-depth review of the Judicial Conduct Commission made possible by the Supreme Court order attached in Appendix B. By reviewing confidential files closed between January 1, 1998 and December 31, 2002 the audit was able to address the following questions:

---

**Audit objectives generally consisted of reviewing JCC complaint files and reviewing their complaint processing procedures.**

---

- What procedures has the JCC adopted, and are those procedures in compliance with the Utah Constitution and state statutes?
- Are investigative techniques employed by the JCC consistent with other state and local prosecutorial offices, including the Attorney General’s Office?
- Is JCC timely and efficient in processing complaints, conducting investigations, and issuing its orders?
- Are recommended sanctions fair and consistent among judges for similar misconduct?
- Is the Supreme Court receiving sufficient information for it to adequately review proceedings as to both law and fact?
- Is the Supreme Court receiving sufficient information to determine whether a recommended sanction is the proper sanction?

A number of significant legislative changes were made to the JCC statutes affecting the composition of the commission and commission procedures and duties during the 2000, 2002 and 2003 legislative sessions. In response to H.B. 136, effective in 2002, several new

commissioners, including a new chair, were confirmed. Also, in June 2002, a new executive director was appointed.

**This Page Left Blank Intentionally**

## **Chapter II**

### **Complaint Process Needs More Standardized Procedures**

---

**JCC staff are making progress in standardizing the complaint process.**

---

Each year the Judicial Conduct Commission (JCC) receives complaints about the judicial system and its judges. Staff review each complaint and determine which appear to violate the Code of Judicial Conduct. Historically, this work has been done with little guidance beyond the JCC's initial statute. However, legislative changes and Supreme Court Decisions have helped the JCC improve its complaint review process. The current JCC director and staff are making progress in standardizing the complaint acceptance, review and presentation process. The commission and staff are also working on rules and procedures to add more structure to the process.

These efforts, however, have been somewhat hindered by the lack of public understanding of the JCC, the continuing need to eliminate complaints beyond the authority of the commission, and the need to streamline the processing of valid cases. There does appear to be a need for greater standardization of investigative criteria. The JCC can do more to reassure the public that judicial misconduct will be dealt with appropriately by providing thorough annual reports and providing public sanctions on line.

### **Wide Variety of Complaints Are Received by the JCC**

Each year the JCC receives complaints from people describing a variety of difficult problems they have had with the judicial system. Some complainants describe what they perceive as injudicious or unethical behavior of a judge, others describe perceived problems with a judicial decision, others complain about a particular law or with the legal system in general. Some complainants are unfamiliar with the Code of Judicial Conduct and how the JCC works but believe they have been harmed and want action.



---

**JCC receives about 100 complaints each year.**

---

## Number of Complaints is Steady

The number of complaints received by the JCC has hovered around 100 cases each year. The JCC has had a full time office and executive director since 1995. Figure 1 shows the historical number of complaints filed with the JCC and the number of cases resolved each year.

**Figure 1. Historical Number of Complaints Filed with the JCC and Number Disposed by the JCC for Fiscal Years 1995 to 2003.**  
The number of complaints has not increased in the past decade.

Fiscal Year	Complaint Filing Count	Case Disposition Count
1995	115	n/a
1996	84	n/a
1997	72	n/a
1998	95	66*
1999	125**	140
2000	97	99
2001	115	100
2002	94	104
2003	97	118

\* Only shows cases resolved in the six-month period from 1/1/98 to 6/30/98.

\*\* Includes 11 individual complaints filed by one complainant against a district court judge, six appellate court judges and four supreme court justices regarding his divorce case. The complaint could have been counted as one complaint.

The number of complaints received by the JCC has not increased over the last decade even though the number of court cases has increased significantly. This lack of complaint growth may reflect a public not familiar with the JCC or its complaint filing process. To compound the problem, the JCC uses an outdated brochure and does not publicly publish its process. Conversely, the lack of complaint growth may also reflect that judges are behaving ethically.

Some other states have a higher correlation between complaints and court activity levels. As an example, Washington's complaints have increased in part because the Commission on Judicial Conduct in

Washington uses its web page to provide useful information to the public. The web page includes a detailed complaint form, an office brochure with answers to a number of frequently asked questions, and a sheet written in plain English describing the confidentiality provisions of the process and when confidentiality starts and stops. Complainants receive these three documents when they contact the office to complain about a judge.

### Majority of Complaints Filed Against Trial Judges

While complaints are filed against judges in all court levels, the majority are against district court judges. Justice Court judges receive the second most complaints. Most judges receive a minimal number of complaints. Only a few judges have received multiple complaints. Figure 2 shows the number of complaints filed by court level for fiscal year 2002.

**Figure 2. Subject of Complaint for Fiscal Year 2002.** District court judges receive twice the number of complaints of other judges.

Judicial Level	No. of Judges	Complaints Received	Court Dispositions	Average Complaints per Judge	Complaints per Case
Pro Tempore	165	3	35,355	.02	.00008
Justice Court	120	23	444,933	.19	.00005
District	70	58	253,078	.83	.00023
Juvenile	25	10	34,282	.40	.00029
Appellate	5	0	546	.00	.00
Supreme	7	0	747	.00	.00
<b>Total</b>	<b>392</b>	<b>94</b>	<b>768,941</b>	<b>.24</b>	<b>.00012</b>

**Majority of complaints are against trial court judges and involve divorce and custody cases.**

District Court Judges receive twice the number of complaints of other judges. To put these complaint figures into perspective, the figure also shows the number of judges in the various courts as well as the 2002 court dispositions for each judicial level. Comparing the number of complaints per case heard shows that juvenile court judges receive the most complaints per case.

Of the 552 complaints filed and resolved between 1998 to 2002, the majority of the complaints only named one judge each. However, in 29

More than half of the judges have never had a complaint filed against them.

Most judges do not know that a complaint was filed against them, and most are not asked to respond to the JCC before the complaint is dismissed.

of the complaints, up to four judges were named in each complaint. Figure 3 shows the number of complaints filed per judge.

**Figure 3. Number of Complaints Per Judge for Calendar Years 1998 to 2002.** More than half of the judges have never had a complaint filed against them.

Number of Complaints Per Judge	Number of Judges
30 - 38	2
10 - 29	5
5 - 9	44
4	10
3	16
2	30
1	77
0	213
<b>TOTAL</b>	<b>397</b>

In the five year audit review period, the JCC received complaints against 184 judges. Only two judges had more than thirty complaints filed against them during this five year period, 18 percent had between 3 and 9 complaints filed against them, and 27 percent had one or two complaints filed against them. It is important to note that more than half of the judges never had a complaint filed against them.

Most judges do not know that complaints have been filed against them because the JCC only requests a response from a judge if the commission has authorized staff to start a full investigation. Full investigations only occur in 16 percent of the JCC cases. The remaining complaints are dismissed without notifying the judge of the complaint.

For those cases that go to full investigation, it is interesting to note the JCC's process. The JCC sends all notices of staff inquiry, investigation, or intended private documents to judges in envelopes with the inscription Judicial Conduct Commission. These documents are sent through the

court system and give notice that the judge is under investigation. To eliminate the potential damage to reputation caused by the document, both Washington and California require the commission to send such notices in envelopes marked “personal and confidential” without the inscription of the Conduct Commission. This confidentiality allows the judge to discretely get information prior to disclosure, thus protecting the judge should the case be dismissed. The State of Washington also has a brochure for court personnel informing them of their responsibilities during misconduct investigations.

### **Majority of Complaints Are Received from Civil Litigants**

The JCC receives complaints against judges from a variety of people, civil and criminal litigants, prisoners, witnesses, attorneys, public officials, and court employees. In addition, staff reviews newspapers for judicial misconduct. There are few repeat complainants; the majority of complainants have only filed one complaint with the JCC. Figure 4 shows the source of the complaints and the percentage resulting in some action against a judge.

The majority of complaints are received from litigants but do not result in actions against judges.

**Figure 4. Source of Complaint for Calendar Years 1998 to 2002.**

The majority of complaints are made by litigants and do not result in actions against judges. Actions taken by JCC include public and private sanctions and dismissal letters with admonition, caution, or comment.

Source	Number of Complaints Filed	Percent of All Complaints Filed	Percent of Complaints Upon Which JCC Took Action
Civil	187	34%	7.5%
Criminal	132	24	9.1
Prisoner	76	14	1.3
Third party witnesses	72	13	9.7
Attorneys	32	6	18.7
Other and Victim	29	5	13.8
Public Knowledge Media Stories	9	2	66.7
Public Officials	8	1	50.1
Court Employees	6	1	33.4
<b>Total</b>	<b>552</b>	<b>100%</b>	

The majority of JCC complaints received from civil and criminal litigants do not often result in actions against judges. Conversely, it is interesting to note that complaints received from attorneys or court personnel, those most knowledgeable of court proceedings, result in a considerably higher percentage of sanctions and cautionary letters.

The highest percentage of actions arise from cases that become publicly known prior to JCC involvement. These few widely publicized cases, because of their public nature, often do not have a written complaint.

It appears that litigants are more prone to file complaints either through lack of system knowledge and/or the more personal nature of their contact. Attorneys and court personnel, on the other hand, work with judges as part of their profession and it is understandable that they

---

**Most complainants only file one complaint; however, there are a few repeat complainants.**

---

would be cautious in filing complaints. The fear of retaliation and job loss is also a concern for some.

Attorney reluctance also affects JCC investigations. For example, in a complaint filed by a civil litigant alleging that a judge was late or did not appear to hearings, the JCC investigator interviewed the attorney. The attorney confirmed that there was a time when the judge did not show up to a hearing and a couple of times when he was late. However, he did not want to be involved in providing more information. Some files show that attorneys state that they have not seen any judicial misconduct and do not agree with the allegations made by the complainants—even if the complainant is their client. In another case, an attorney filed a complaint with the JCC and sent a copy of the complaint to the newspapers. The JCC received several unsolicited letters from other attorneys refuting the claim of misconduct and supporting the judge.

There are repeat complainants. The complainant who filed the most complaints in the past five years filed 11 individual complaints against a district court judge, six appellate court judges and four supreme court justices regarding his divorce case. The complainant to file the second highest number of complaints filed five complaints. However, he may have also assisted seven other individuals in filing complaints regarding the same court incident because the seven additional complaints appear to be copies of the first complaint. The complainants claimed that in a hearing they witnessed the judge refusing to take judicial notice of various rules of evidence. These complaints were dismissed for lack of evidence of judicial misconduct and because some of the issues were appealable.

## **Complaint Process Is in Large Part Determined by Staff Decisions**

There are general guidelines regarding the entire disciplinary process, yet there are no widely accepted standards as to how investigations should be conducted. In Utah, the investigation function is separate from the adjudication function. Investigations are done by JCC staff and the executive director. Adjudication is done by the commission. Complaint procedures are not well defined in administrative rules or in statute. Consequently, the process of accepting and developing cases is based on past actions and the experience of the current staff. If the director and staff have an investigative leaning, the process has more of an adversarial

tone; if the staff is legal/prosecutorial, the process clearly takes on a more legal tone. The current director has worked to streamline the process, focusing the system's direction more clearly on the Canons. As a result, case processing times appear to be decreasing.

### **Staff Determines Depth of Investigations**

The staff does not have any written standards for investigations. Utah, as do most other states, bases its investigative work on its interpretation of the Canons of the Code of Judicial Conduct. As such, a comparison of investigations to prosecutorial office investigations may not be appropriate as most judicial conduct investigations are ethics violations not criminal ones. In cases of illegal activity, the staff relies on law enforcement to do the investigation of the illegal activity.

Without set standards, the actions of the staff investigators become paramount in determining the direction of cases. Investigators review complaints, conduct preliminary investigations to determine the facts, and determine whether the alleged conduct could be a violation of the Canons. After the initial investigation, the investigator prepares a preliminary investigation report describing the evidence reviewed, analysis of the case and a recommendation of whether the case should be dismissed or the commission should authorize a full investigation. Thus, the investigative findings are the basis for commission action. Commission action will be discussed in Chapter 3.

**Quality of Reports Has Varied with Investigator Changes.** In the past few years, the office has employed various investigators who have emphasized different elements of case processing. Some preliminary investigation reports were comprehensive while others failed to give a good analysis of the issues or explain why a given recommendation was made. Comments such as "unremarkable" appeared quite often in one investigator's preliminary reports. Another investigator was far more detailed, gathering more evidence and taking more time per case. A newer investigator sees the position in more moderate terms, not requiring a lengthy investigation for every complaint. The current director said that under his administration, investigations will stay focused on the actual complaint and not go into other areas.

**Quality of Charging Documents Vary.** Depending on how a case proceeds, staff, at the direction of the commission, prepare various

---

**In some cases the documents are too brief to be useful.**

---

---

**Dismissal letters are brief and do not describe the reasoning used to make the decision.**

---

---

**A formal appeal process would allow complainants to know what their options are.**

---

documents such as the Notice of Formal Proceedings, Stipulation, Findings of Fact, Conclusions of Law, and Order. In some cases, the documents were comprehensive and described the allegations, the evidence and the findings of the commission. In other cases, the information was so brief that it was difficult to determine the misconduct. In some case files, the charging document was very brief and confusing. The allegations need to be detailed so that the judge understands what he or she is charged with and what Canons he or she is violating. In one case, the Supreme Court remanded the case to the JCC because the information was so lacking that the court could not understand the misconduct. Other states' documents are more detailed.

**Complainants Receive Short Dismissal Letters.** More information could be transmitted to the complainant when the JCC dismisses cases. Currently, JCC staff send very short dismissal letters to complainants. Some other states provide a more explanatory dismissal letter stating the reason for the dismissal. As an example, California categorizes dismissal reasons as appealable issue, commission has no jurisdiction, unsubstantiated, no violation found, and complaint withdrawn. Allowing this slightly greater amount of information can aid in ending the allegation or can clarify complaint problems that can be remedied and thus further pursued.

The American Bar Association Rule 16 also comments that dismissal letters should include a brief summary of the facts and reasoning upon which the decision to dismiss was made. In addition, they state that informative dismissal letters are important because providing notice to complainants of the final disposition in all cases is vital to maintaining public confidence in the judicial disciplinary system.

**A Formal Appeal Process Could Provide a Check on the System.** At this time, the JCC has no formal appeal mechanism in place. Some complainants have questioned the depth of staff investigations by sending follow-up letters once they receive a dismissal letter from the JCC. Sometimes these cases are reviewed by the Executive Director, but without a formal appeal process in place, complainants are not made aware of their options. This lack of information resulted in two complainant's appeal to the Supreme Court, another appeal to each commission member individually, and still others appealing to individual legislators.



Appeals are allowed in cases of attorney misconduct. The Office of Professional Conduct's rules allow complainants to appeal a dismissal by OPC counsel to the Committee chair within 15 days. Upon appeal, the Committee chair shall conduct a *de novo* review of the file and either affirm the dismissal or require OPC counsel to prepare a chair's recusal. Other states provide for an appeal or a reconsideration of disposition and track the number of requests for a reconsideration as well as the number granted and denied.

If the JCC provided a formal appeal process, where the complaint would be reviewed by an independent investigator not involved in the initial investigation, this process would help reassure the public that their complaints were reviewed.

### **Changes Can Improve Process**

While most JCC cases were handled appropriately, a few cases were not presented to the commission as required. Through our review of cases over the last five years, we found a few cases where staff did not follow commission-determined actions and a few cases that failed to go through the entire process. Procedural changes can better define the JCC's process and give greater assurances that each complaint is handled properly and resolved in a timely manner. As stated, the new director has implemented several improvements in the process; however, additional changes appear necessary.

---

**Only two complaints were not provided to the commission.**

---

**All Cases Need to Go to Full Commission.** Two complaints were not provided to the commission for action. It is unclear why the investigative reports were not presented to the full commission. In another case, the commission authorized a preliminary investigation which was never performed by the JCC staff because the judge, at some point, stepped down. In another case, the commission voted to commence with formal charges but the then director closed out as an informal resolution without documented commission approval. In two other complaints, letters of caution were sent to the judges without opening a complaint file. These cases violated commission protocol.

We also found a few instances where several complaints against a judge were consolidated into one case. These consolidated cases are confusing and there is no clear paper trail showing whether each of the

issues raised by complainants was addressed by staff and by the commission.

**New Procedures Are Lending Continuity to the Investigative Process.** The new director has created a new preliminary investigation report helpful in focusing investigations on a commission-approved process. The new form has a longer analysis section in an attempt to provide better decision-making information to the commissioners.

Even with the new form and established procedures, the JCC continues to deal with interpretation of information. Most of the evidence used by the JCC is found in court tapes, in court dockets and by interviewing people, and/or from other investigative agencies.

Gathering information from court files and interviews is fairly straightforward. In the preliminary investigation stage, subpoenas are not used, and the assumption is that all people interviewed are being truthful. The challenge comes in comparing the evidence to the Canons to determine if there is any misconduct. Some Canons are very general and do not establish degrees of violations or misconduct. It is for this reason that evidence is presented to the commission for them to determine further action.

**Investigative Process Can Improve with Better Knowledge of Canon Violations.** The Code of Judicial Conduct is divided into five Canons and they are further divided into sections and subsections. To date, the JCC has not attempted to identify the relationship between complaints and canon violations. A review of this relationship, however, shows where complaints are coming from and which complaints have the greatest likelihood of identifying canon violations. Figure 5 identifies the Canons with the greatest percentages of allegations and sanctions.

**The most common complaint allegation is that a judge is biased or prejudiced.**

**Figure 5. Comparison of Alleged Canon Violations with Canon Violations Cited in Sanctions and Dismissal Letters for Calendar Years 1998 to 2002.** The most frequently cited allegations result in few sanctions.

Canon		Percent of Complaints That Alleged This Canon Violation*	Percent of Complaints Upon Which JCC Sanctioned Judge	Percent of Complaints Which JCC Dismissed with Action
3B(5)	A judge shall perform judicial duties without bias or prejudice.	29.2%	.4%	1.8%
3B(2)	A judge shall apply the law and maintain professional competence.	26.8	.2	1.8
3B(7)	A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law.	22.1	.7	3.1
3B(4)	A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.	17.4	2.4	1.8
2A	A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.	14.9	.4	.9
1	A judge shall uphold the integrity and independence of the judiciary.	9.8	2.0	1.4
3E(1)	Disqualification. A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned.	8.2	.7	.9
2	A judge shall avoid impropriety and the appearance of impropriety in all activities.	7.6	2.9	1.4
3B(8)	A judge shall dispose of all judicial matters promptly, efficiently, and fairly.	5.8	0	.2
3	A judge shall perform the duties of the office impartially and diligently.	4.7	0	0
2B	A judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment.	4.3	.4	1.0
4A	A judge shall conduct the judge's extra-judicial activities so that they [minimize the risk of conflict with judicial obligations].	1.8	1.3	0

\* Totals more than 100 percent because of multiple allegations per complaint.

Figure 5 shows that most complaints are unfounded. In the cases of the two most frequently cited allegations, 3B(5), biased or prejudicial behavior, and 3B(2), failure to apply the law as prescribed, few complaints actually result in sanctions. It appears that some complaints are from dissatisfied litigants who may not understand that a misconduct complaint is not an alternative to an appeal or a means for obtaining a substitution of judge. Usually analysis done by JCC staff shows that the complainant did

not understand court procedures. In these cases, better training of judges should eliminate some unsubstantiated claims and thus reduce JCC workload. Improved screening of claims by the JCC staff for certain alleged canon violations may eliminate the need for a full preliminary investigation and thus reduce the workload.

Figure 5 also shows canon allegations that more frequently result in sanctions or cautionary letters. Violations of Canons 2, avoiding the impropriety or appearance of impropriety, and 3B(4), discourteous behavior are easier to prove with court tapes. JCC involvement in these allegations appears more justified as does an increased training emphasis. Improved monitoring of complaints and sanctions should result in better understanding of problems, real and perceived.

An interesting note for training purposes is the high number of dismissals with cautionary notes associated with some Canons. In these cases, primarily 3B(7) and 3B(2), complaints were filed against judges as a result of apparent misunderstandings of procedure that often could have been explained by the judge during the court proceeding. The JCC could provide a valuable service to judges by providing feedback on these types of problems during judges' training programs.

Although relatively few complaints are received regarding judges' behavior off the bench, Figure 5 shows that a high percentage of Canon 4A complaints result in sanctions.

### **Case Processing Time Is Decreasing And Backlog Has Been Resolved**

Resolving complaints quickly is important for the judge, the complainant and the public. The JCC does not have written standards or goals for the amount of time it should take for complaints to be resolved. The average time to resolve complaints decreased from Fiscal Year 1998 to 2003. A complaint is considered closed when it is dismissed or sent to the Supreme Court for action.

For the past few years, the JCC has had a backlog of pending cases. Personnel changes, procedural changes, equipment upgrades, and a case management system have assisted in getting pending cases resolved. Figure 6 shows the number of complaints received by the JCC in each Fiscal Year from 1998 to 2003 and the time it took to resolve the

---

**Backlogged cases  
have been resolved  
and new complaints  
are being resolved  
more quickly.**

---

complaints received. The figure also shows the unresolved complaints as of December 2003.

**Figure 6. Historical Review of Complaints Received and Time to Complete Cases.** Complaints are being resolved more quickly, usually within six months.

Fiscal Year	Complaints Received	< 3 Months	3-6 Months	6-12 Months	1-2 Years	> 2 Years	Unresolved*	Average Months to Complete
1998	95	11	35	29	19	1	0	8.1
1999	125	39	41	39	3	3	0	5.7
2000	97	29	36	29	2	0	1	5.0
2001	115	15	39	43	17	0	1	7.4
2002	94	20	31	42	1	0	0	5.7
2003	97	25	41	22	0	0	9	4.7

\* Unresolved cases do not appear in the average.

The average time to resolve complaints decreased from Fiscal Year 1998 to 2003. In Fiscal Year 1998, 79 percent of complaints were resolved within a year, 19 complaints took between one and two years to resolve and the longest complaint took two years and one month to resolve. In Fiscal Year 2002, 99 percent of all complaints were resolved within one year. Only one complaint took longer than one year to resolve. Now, most complaints are resolved within six months but a few complex complaints will take longer to resolve because of increased opposition from some judges.

One reason for delay can be explained by a review of the amount of time judges have taken to respond to JCC inquiries. Accused judges are asked to respond to a complaint after a preliminary review has been completed and after the commission has authorized a full review. The JCC staff writes a letter to the judge summarizing the allegations, adding analysis and detailing the code sections that the judge is accused of violating. JCC rules require judges to respond within 15 days of a request by the JCC.

More than half the judges, however, do not respond within the 15 day requirement. Of the 552 complaints logged against judges in the past five

The average time to resolve complaints has decreased from 1998 to 2003.

More than half the judges do not respond within the 15 day requirement.

years, 91 judges were asked to respond. Of these, only 42 percent responded within 20 days (includes 5 days for mail delivery), 56 percent exceeded 20 days and 2 percent did not respond at all. Of those that exceed the time requirement, 31 judges filed a response between 20 and 40 days, 16 judges filed a response between 40 and 100 days, and 4 judges took longer than 101 days. The longest response took one and one-half years because the case was appealed and the judge wanted access to the completed case file in order to complete his written response. Judges asked for more time to respond because of busy schedules, family emergencies, and the need for more detailed information and supporting documentation on which to base their response.

In most case files there was no documentation that additional time to respond was either requested by the judge or accepted by the JCC. Because of a lack of file documentation, it is unclear if there were requests for additional time to respond. The current director states that judges frequently call to request additional time and he always grants the extension and asks that the response be sent and received by the following JCC meeting. Consequently, the response time is closer to 50 days.

### **Not Publicizing JCC Sanctions Reduces JCC's Effectiveness**

Part of the purpose of judicial discipline is to reassure the public that the judiciary does not tolerate judicial misconduct. Consequently, commissions in some other states have put statistics and decisions online so that people can see the work done to eliminate judicial misconduct. Conversely, Utah's web page is in the early states of development and has very little information.

Utah's JCC publicly discloses few statistics or decisions. The JCC does publish an annual report with limited information, but this report is not widely distributed nor is it on their web page. Some other states put their annual reports, showing current and historical activities of the commission and all discipline cases, on their web pages to increase public access. The Office of Professional Conduct does list the sanctions they give in a "Discipline Corner" in the bimonthly *Utah Bar Journal*, but the general public does not receive or read this journal.

---

**JCC publicly discloses  
very little information  
to the public.**

---

---

Utah's Web page should be improved with historical and statistical information and information on every sanction given.

---

---

Other states provide extensive information for the public on their web pages.

---

**Utah's JCC Provides Little Information to the Public and Other Judges.** The JCC web page lacks important information that the public could use to see what the JCC is accomplishing. Such information would also help judges avoid repeating the misconduct of other judges. Office statistics and sanctions against judges are not publicized and are not on the JCC's web page. Consequently, the public does not know what actions the JCC has taken or that they have acted on complaints written by the public. ([http://www.utahbar.org/uljc/judicial\\_conduct\\_commission.html](http://www.utahbar.org/uljc/judicial_conduct_commission.html))

In addition, Utah's annual report is only four pages long and provides information for only one year. Distribution is limited to judges and those who request one. The annual report is not on the commission's web page. A more thorough annual report with historical information and a wider distribution could add to greater public understanding and respect for the commission.

**Other States Provide Extensive Information to the Public.** Some other states have very extensive annual reports showing the activities of the commission, and some states even include a copy of the complaint form, frequently asked questions about the office, state statute, rules and historical information about sanctions.

In addition to annual reports, some states have extensive web pages that provide far more information than Utah currently does. The State of California Commission on Judicial Performance's web page shows all discipline imposed by the Supreme Court and by the Conduct Commission from 1960, when the office began, to the present. Each removal, censure, public admonishment, public reproof and order of dismissal is listed with links to the actual documents. Because all discipline in California is public, the public may also review currently open public cases which have not yet reached a conclusion. Public cases in which a recommended decision has been made to the Supreme Court are listed. Each case contains documents such as, but not limited to, statements of charges and answers to statements of charges, commission written decisions, and dissenting opinions. ([www.cjp.ca.gov](http://www.cjp.ca.gov))

The State Of Washington Commission on Judicial Conduct's web page shows the number of complaints and the disposition from 1995 to the present. In addition, it contains all commission decisions and statements of charges, inclusive of evidence, from 1995 to the present. As

time and resources permit, they plan to include more documents for additional years. ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)) The Nevada State Commission on Judicial Discipline also has commission decisions from 1995 until the present with links to actual documents. ([www.judicial.state.nv.us](http://www.judicial.state.nv.us)) The State Commission on Judicial Conduct in Texas provides extensive statistics including case disposition history for five years so the public can see a historical comparison. ([www.scjc.state.tx.us](http://www.scjc.state.tx.us))

## **Recommendations**

1. We recommend that the JCC and staff set standard parameters for investigations and put these parameters in their rules.
2. We recommend that the staff clearly write charging documents, Notices of Formal Proceedings, Stipulations, Findings of Fact, Conclusions of Law and Order.
3. We recommend that the JCC and staff provide more informative dismissal letters to complainants.
4. We recommend that the JCC and staff set up a formal appeal process.
5. We recommend that staff insure all resolutions be entered into by a vote of the commission.
6. We recommend that JCC staff provide information to judges at training conferences regarding the types of complaints that the group is receiving.
7. We recommend that JCC staff make sanction decisions and annual reports available on their web site.
8. We recommend that the JCC update their office brochure and create a brochure for court personnel informing them of their responsibilities during misconduct investigations.



**This Page Left Blank Intentionally**

## **Chapter III**

### **Commission Actions Should Be Fair, Consistent and Accountable**

---

**Commissioners review complaints in confidential monthly meetings and dismiss the majority of complaints for lack of evidence.**

---

Commissioners adjudicate complaints in confidential meetings based on investigations conducted by JCC staff. Then, by majority vote, determine whether or not there is judicial misconduct. If they determine that there is misconduct, the commissioners choose a disciplinary action called a sanction. Decisions regarding sanctions have been described by another states' supreme court as "collective judgement calls resting on an assessment of the individual facts of each case, as measured against the Code of Judicial Conduct and prior precedents."

Commission written decisions are unclear as to how the Commission determines the sanctions. Since there is turnover in commissioners, it is important to provide commissioners with historical information and precedents so that they are able to make more informed decisions insuring that they are comparable to previous decisions made in Utah and in other states.

### **Commission Decisions Should Be Well Reasoned and Documented**

Choosing the appropriate sanction for misconduct presents the JCC with the challenge to be fair, consistent, and accountable. It is unclear how the JCC makes the decision regarding which sanction to recommend. There are no guidelines regarding when public or private sanctions can be used or which sanction can be given within these two categories. The *Utah Constitution* provides, without further description, five available sanctions: reprimand, censure, suspension, removal or involuntary retirement. Over the years, JCC rules have broadened the list of possible sanctions by allowing a variety of informal, private sanctions.

### **Commission Actions Are Varied**

The JCC has resolved the majority of complaints against judges by informal, private actions. From July 1996 through June 2003, the JCC took eighty-two actions against judges from the 695 complaints they

---

**Majority of complaints against judges are resolved informally.**

---

received. Figure 7 shows the number of actions taken by the commission in each category by fiscal year.

**Current Disciplinary  
Sanctions Available:  
Defined in  
Constitution:**

- Reprimand
- Censure
- Suspension
- Removal
- Involuntary Retirement

**Defined in Statute:**

- Informal Reprimand

**Figure 7. Number of Actions Taken by the JCC for Fiscal Years 1997 to 2003.** The JCC has taken 82 actions against judges and 80 percent of the actions were private.

Action	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03	Total
<b>Complaints Received</b>	<b>72</b>	<b>95</b>	<b>125</b>	<b>97</b>	<b>115</b>	<b>94</b>	<b>97</b>	<b>695</b>

**Formal Actions (Public):**

Involuntary Retirement								0
Removal								0
Suspension								0
Stipulated Public Censure	1		3	1				5
Public Reprimand		1		1	1		1	4
Stipulated Public Reprimand	3	2	1		1		1	8
<b>Total Public Sanctions</b>	<b>4</b>	<b>3</b>	<b>4</b>	<b>2</b>	<b>2</b>	<b>0</b>	<b>2</b>	<b>17</b>

**Informal Actions (Private):**

Informal Reprimand	5	1			1			7
Stipulated Informal Reprimand					2	5	5	12
<b>Total Informal Sanctions</b>	<b>5</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>5</b>	<b>5</b>	<b>19</b>

<b>DISMISSALS &amp; OTHER ACTIONS</b>								
Voluntary Resignations				2			1	3
Informal Resolutions			6	3				9
Dismissed Judge not Reappointed				4				4
*Dismissed with Admonition	4							4
*Dismissed with Caution		5	7	2	4			18
*Dismissed with Comment	1		2	5				8
<b>Total Dismissals and Other Actions</b>	<b>5</b>	<b>5</b>	<b>15</b>	<b>16</b>	<b>4</b>	<b>0</b>	<b>1</b>	<b>46</b>

**Total Formal and Informal Actions:**

<b>Total Actions</b>	<b>14</b>	<b>9</b>	<b>19</b>	<b>18</b>	<b>9</b>	<b>5</b>	<b>8</b>	<b>82</b>
----------------------	-----------	----------	-----------	-----------	----------	----------	----------	-----------

\* Not used after H.B. 285 but dismissal with advice is still available.

---

**Nationwide only 100 judges were removed between 1990 and 2001 suggesting that removal is not appropriate for a single act of misconduct.**

---

---

**Public sanctions are used less than private sanctions.**

---

Figure 7 shows that in the past seven years, the Commission has issued 17 formal, public censures and reprimands; 19 informal sanctions; nine informal resolutions; and dismissed 34 complaints with a letter of admonition, caution or comment to the judge. In addition, three judges resigned in the midst of an investigation.

Although the Constitution gives the Commission authority to recommend involuntary retirement, suspension and removal of judges, the commission has not successfully made these recommendations to the Supreme Court. A recent study by the American Judicature Society (AJS), which reviewed all 110 judicial removals in the country from 1990 through 2001, suggests that removal is generally appropriate for a pattern of intentional misconduct while carrying out judicial duties and that removal is generally not appropriate for a single act of misconduct that does not involve a criminal or dishonest act.

**Formal or Public Sanctions are the Commissions' Strongest but Least Used Discipline.** The Commission recommended that 17 judges receive public censures or reprimands. The characteristics of these actions include the following:

- Paper files maintained at the Utah Supreme Court and available to the public.
- Judges' name and a brief recap of the misconduct and the Canons violated listed in the annual JCC report in the year it occurred.
- Summary information included in the Voter Information Pamphlet for the next election.
- Possible stipulated meaning the case resolved without going to formal hearing. Also, if there is a stipulation it is unlikely there would be an argument before the Supreme Court.

Types of misconduct for which judges have received formal public sanctions include the following:

- for an ongoing sexual relationship with a defendant and several incidents involving advances
- for misusing public moneys and failing to forward abstracts of reportable traffic violations to the Driver License Division
- for knowingly driving an unregistered vehicle for several months
- for criticizing jurors on-the-record in the courtroom in two cases

---

Private reprimands are used more than public sanctions.

---

**Informal Private Reprimands Are Used More than Formal Public Sanctions.** Prior to H.B. 136, private reprimands were handled privately between the judge and the Commission. However, H.B. 136 required the JCC to provide reprimands to the Supreme Court and, therefore, private reprimands are now handled between the judge, the commission and the Supreme Court. The commission issued 19 private reprimands that had the following characteristics:

- A brief description of the misconduct and the Canons violated are listed in the annual JCC report. Judges' name is not listed.
- No Supreme Court review prior to H.B. 136.
- After H.B. 136, effective May 2002, reprimands are forwarded to the Supreme Court but file remains confidential
- Information to Judicial Council for certification. A summary of the misconduct is to be included in the Voter Information Pamphlet; and, disclosure is made to specified individuals.
- Can be stipulated, meaning that the case is resolved without going to formal hearing. Also, it is unlikely there would be an argument before the Supreme Court.

Types of misconduct for which judges have received informal private sanctions include the following:

- for writing a letter to another court expressing an opinion on evidence before the other court.
- for participating in *ex parte* conversations with police officers concerning a pending criminal proceeding
- for speaking discourteously to litigants
- for accessing adult pornography sites on a government-owned computer

---

Informal resolutions were used instead of sanctions, and information was not forwarded for retention election purposes.

---

**Informal Resolutions Were Used Instead of Informal Sanctions in Fiscal Years 1999 and 2000.** Nine of the 82 actions were informal resolutions. Informal resolutions are private resolutions between the judge and the JCC where the JCC found that the conduct was in violation of the Code of Judicial Conduct, but the judges were not reprimanded. The resolutions had the following characteristics:

- No Judicial Council review for certification.
- No Supreme Court review.

---

Some complaints were dismissed, yet the judge was notified that there may be a problem with the behavior.

---

- Were summarized in the JCC's annual report. Judge's name is not listed.
- Were allowed by a revision of JCC statute and subsequent rule 9.

Judges received informal resolutions for the following actions:

- for personal use of court resources
- for being discourteous and impatient to people who appeared in court
- for making a prejudicial comment to a litigant and later participating in an *ex parte* conversation
- for initiating, participating in, and considering an *ex parte* communication with a defendant and his father concerning a pending criminal proceeding

**Dismissals with Action Were Used Heavily until Fiscal Year 2002.** In 34 of the 82 actions, the complaints were dismissed, but the commission determined that some action was necessary and sent a letter to the judge in an attempt to notify him or her that there may be a problem with the behavior. Dismissals with action have the following characteristics:

- Handled privately between the judge and the Judicial Conduct Commission.
- Letters put in the files that no one besides the judge and the JCC will see.
- Not reported in the JCC Annual report.
- No Supreme Court review.
- No Judicial Council review for certification.

Types of misconduct for which judges have received letters include the following:

- for initiating an *ex parte* telephone call to an attorney in a divorce case asking her to make some corrections and additions to the order
- for being discourteous to a litigant
- for lashing out at people appearing in court
- for not according people the right to be heard

## **Elimination of Some Private Sanctions May Result in More Dismissals**

As complaints go through the disciplinary process, only a small number go to formal hearings. The small number is in part because state statute now calls for public discipline after a hearing if there is a finding of misconduct. It is a concern that some commissioners may dismiss complaints rather than go forward with a formal hearing because they think that the statute that went into effect on May 1, 2003 requiring public discipline after a formal hearing would be too harsh. In the last few months, several complaints have been dismissed after formal charges were filed. Some have been split decisions where some commission members did not agree to dismiss the complaint because they thought that there was misconduct. Prior to this time, the majority of commission decisions were unanimous.

---

**JCC believes they have no alternative resolutions available for minor misconduct, so complaints are dismissed.**

---

**Fewer Actions Were Taken in Fiscal Years 2002 and 2003 than in Previous Years.** We suspect there were fewer actions taken in fiscal years 2002 and 2003 because the Commission believed there were no available private sanctions in judicial discipline proceedings before filing of formal charges. The majority of other states have private sanctions available. The JCC believes they only have two options: dismiss cases or go to formal charges. Consequently, for minor infractions that the commission does not believe rises to the level of sanction, the complaint is simply dismissed. In prior years Utah, like most other states, routinely sent letters of caution for minor misconduct to judges. In some cases, it appears the current JCC members want more options than the two currently available. The following motion passed unanimously in a confidential JCC meeting, shows the commission's desire for more options:

The Commission discussed whether the two statements made by the judge in and of themselves warrant a finding of judicial misconduct. Concluding that they did not, it was noted that this matter is indicative of the need for alternative resolutions, all of which have been removed by the Legislature and/or the legislative rules review process.

**Prior to H.B. 285, JCC Routinely Issued Letters of Admonition, Caution or Comment.** Prior to H.B. 285, JCC rules allowed the commission to write letters of advice or comment to judges when they felt

---

**Prior to 2000, the JCC routinely sent letters of admonition, caution or comment for minor misconduct, yet this option is no longer available.**

---



the conduct did not rise to the level of misconduct, yet was offensive conduct and the commission wanted to put the judge on notice. Examples of portions of some letters include the following comments:

- “The commission dismissed the complaint against you for insufficient evidence of judicial misconduct to warrant further proceedings but offers the following cautionary advice to help you avoid future allegations of judicial misconduct.”
- “Canon 3B4 of the CJC requires judges to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. Although the CJC does not define ‘patience’ or ‘courtesy’, Canon 1 requires judges to personally observe high standards of conduct so that the integrity and independence of the judiciary will be preserved. The Commission is not asking you to respond to this letter and offers the foregoing advice solely for the purpose of helping you avoid future allegations of judicial misconduct.”
- “Unlike Canon 3B(7) of the Model Code of Judicial Conduct, Canon 3B(7) of the CJC does not authorize ‘procedural’ *ex parte* communications concerning a pending or impending proceeding.”

**Prior to 1998, Commission Rules (“Rule 9”) Provided for Either a Private Reprimand or a Dismissal with Admonition after an Investigation.** Under this rule, the complainant was notified if a private reprimand was issued or if a complaint was dismissed with an admonition. Judges criticized the Commission for not maintaining strict confidentiality in connection with the private reprimands and dismissals with admonition. The Commission amended the rules to provide for a number of “informal” actions (reprimand, admonition, direction for counseling, conditions, or other appropriate measures) rather than “private” disciplinary actions. Under the changes, the commission had discretion to decide whether to notify the complainants of the action, and did not have to disclose the actions to the Supreme Court.

By creating several new disciplinary actions, the commission went beyond those constitutionally available orders. As an example, a series of complaints against one judge resulted in an 18-month probation that was done on a confidential basis. Complainants were given no more information than the case had “been resolved.”

In 2000, H.B. 285 eliminated the “informal” actions that were considered to be unconstitutional by changing the language in the statute to only allow the five constitutionally available orders—reprimand, censure, suspension, removal or involuntary retirement. H.B. 285 also gave the commission the ability to issue an informal order of reprimand. However, the commission was given a very specific list of people to whom the informal order of reprimand was to be disclosed.

## **Lack of Guidelines Has Resulted in Inconsistent Actions**

Over the past seven years, the JCC has imposed various sanctions in specific cases on an ad hoc basis, weighing the misconduct in the case against the sanctions they have available. This ad hoc approach is the process used in Utah and makes some sense given the wide variation of conduct reported in the cases. However, the approach has also produced some results that lack uniformity and consistency with other JCC decisions. Providing guidelines for commissioners will help assure that fairness is realized.

Guidelines are important because commissions can be comprised of individuals who sometimes have differing views on what an appropriate sanction should be based on stipulated facts and interpretation of the Code of Judicial Conduct. Consequently, different decisions may be reached. There are no guidelines as to how the various sanctions can be used, when private or public sanctions should be used, or how many private sanctions can be given to a judge before it rises to another level.

## **Commission Does Not Clearly Document How They Arrive at a Given Sanction**

Written commission decisions do not link the facts of the case and the ultimate decision made by the Commission. In *re Worthen* the Utah Supreme Court noted the importance of this step:

We expect the Commission’s findings to resolve questions of fact and provide an explanation of its assessment of the facts so as to provide a reasoned basis for its decision. There must be an explanation of the linkage between the raw facts and the Commission’s ultimate conclusions, including an explanation of

---

**Commissioners have differing views on what an appropriate sanction should be based on their interpretation of the Code of Judicial Conduct.**

---

---

**The *In re Worthen* decision requires the Commission to logically link its factual findings to the recommended sanction.**

---

why the Commission drew the inferences from the facts that it did. Finally, the Commission must logically link its factual findings and legal conclusions to the recommended sanction order to explain why it chose one sanction over another.

**In Some Cases, the Given Sanction Appears to be Different Than the Sanction Given to Another Judge.** In one case the file contained a judge's letter to the presiding judge and explained why he wanted to be recused from a case. The commission voted to send a letter of caution to the judge. According to the current JCC executive director, there is clear case law that judges cannot write such letters of explanation.

In another instance, a judge was given an informal resolution for initiating, participating in and considering an *ex parte* communication with a defendant and his father concerning a pending criminal proceeding. Another judge received a private reprimand for this type of misconduct.

In another instance, a judge received an informal resolution for speaking discourteously to litigants. Another judge, however, received a private reprimand for similar type and level of misconduct.

**Other States Provide Written Documentation Supporting Their Decisions.** Some other states such as New York, Washington and California clearly write out their decision and show how they arrived at the decision. They also document each of the aggravating and mitigating factors. If there is a dissenting opinion regarding the sanction chosen by the majority, a dissenting opinion is also included.

A recent AJS report also stated the importance of this step. The report stated:

There are some steps courts and commissions could take to remove any suggestions that the sanction decision is just a matter of guesswork or that it depends too much on favoritism or bias. Most important, when recommending or imposing a sanction, a conduct commission should give a detailed explanation of the factors that formed the basis for its decision and include comparisons with analogous cases where possible. Similarly, the supreme court, in imposing a sanction, should expressly articulate the factors leading to its decision, particularly if the court disagrees with the sanction recommended by the commission. A clear

---

**Clearly documented  
decisions bolsters  
confidence in the  
system.**

---

---

**Commission members state that sometimes one complaint doesn't rise to the level of judicial misconduct.**

---

---

**Utah has ten non-exclusive factors that should be used in determining what the appropriate sanction should be.**

---

explanation for a decision bolsters confidence that the process by which it was reached was rational and unbiased even if the conclusion is debatable.

### **Commissioners must Decide What Misconduct Rises to the Level of Judicial Misconduct**

Commission deliberations are confidential, and JCC minutes show that periodically commissioners state that the complaint does not rise to the level to warrant discipline. Some commission members note that although one complaint does not rise to the level of judicial misconduct, but taken with the other complaints against a judge, they all may rise to the higher level. It is a difficult balancing act to review each complaint independently and to determine what rises to the level of judicial misconduct. It is also difficult when commissioners know of a judge's history and behavior patterns while other newer commissioners see the complaint as not rising to the level to warrant discipline. The question appears to change from whether the judge abided by the Canons in a particular situation to a judgement about the judge's overall character.

**To Aid its Decision Making, the JCC Adopted Ten Non-exclusive Guidelines for Determining the Level of Sanction.** However, these guidelines are not detailed in the Rules of the Commission and are not specifically documented when the commission makes their decision, and they are not fully documented when the commission order goes to the Supreme Court. Utah's ten non-exclusive factors are as follows:

1. Whether the misconduct is an isolated instance or evidenced a pattern of conduct.
2. The nature, extent and frequency of occurrence of the acts of misconduct.
3. Whether the misconduct occurred in or out of the courtroom.
4. Whether the misconduct occurred in the judge's official capacity or in his/her private life.
5. Whether the judge has acknowledged or recognized that the acts occurred.

6. Whether the judge has evidenced an effort to change or modify his/her conduct.
7. The length of service on the bench.
8. Whether there have been prior complaints about the judge.
9. The effect the misconduct has upon the integrity of and respect for the judiciary.
10. The extent to which the judge exploited his/her position to satisfy his/her personal desires.

Each of these factors is not addressed in commission decisions, and their use is not detailed in rules. Therefore, it is unclear how Utah uses these factors or whether they are part of the decision making process of the JCC.

In contrast, the Washington State Commission on Judicial Conduct's rules state that similar factors must be considered in determining the appropriate sanction for a violation of the Code of Judicial Conduct. Therefore, when one reviews a Commission decision, the factors and response to each factor are clearly documented in the decision. After the factors and response are listed, the commission determines the appropriate sanction, and that decision is also detailed using examples from other cases to support the final sanction given. Dissenting opinions are also detailed in the commission decision.

Some other states use the above ten factors, while other states use even more factors. Since the JCC is currently reviewing their rules, this would be an ideal time to review the list of factors and then to put the agreed upon standards into rules after they are publicly disseminated. The discussion could also include a discussion regarding the following:

- What is meant by a pattern of conduct?
- How should the length of service on the bench be viewed?
- Should prior private resolutions and dismissals with letters be included when JCC deliberates?
- What weighting should be given to the judge's record?
- Should a judge's personal problems be included?

**Level of Evidence in Utah Is less than in Other States.** Utah statute requires that the recommendation for sanction in judicial conduct proceedings must be based on the “preponderance of the evidence,” meaning that 51% of the evidence must be on the side of misconduct instead of the more difficult to establish “clear and convincing” threshold which requires a much greater level of evidence. However, even with the lower level of evidence, the commission dismisses most complaints for “lack of evidence.”

Rule 7 of the American Bar Association’s Model Rules for Judicial Disciplinary Enforcement reads that charges of misconduct shall be established by clear and convincing evidence. The commentary to the rule reads:

That Judicial disciplinary cases are neither civil nor criminal in nature but are *sui generis*. “Clear and convincing evidence” is a standard of proof higher than the civil law standard of “preponderance of the evidence” and lower than the criminal law standard of “beyond a reasonable doubt.” The standard of proof required to sanction a respondent’s conduct is thus commensurate with the importance of protecting the judicial system’s ability to function – more than required to prove a private wrong, less than required to prove a criminal offense. The same standard is applied in lawyer disciplinary proceedings.

**Some Actions Appear Inconsistent When Compared to Other Decisions.** There appear to be inconsistencies in the handling of cases when a judge resigns or retires. If a judge resigns during an investigation, some think that no further harm can be done by that judge and, thus, stopping the investigation and dismissing the complaint is appropriate. On the other hand, others think that the investigation must continue and the judge should be sanctioned.

For example, one judge had a complaint filed against him, and the JCC started investigating it. Four additional serious complaints were filed, some of which provided additional information on the initial complaint. In numerous correspondence with staff over many months, the judge said he would retire. It appears, however, that the judge stretched out the time until he could retire when he wanted to do so.

In the meantime, he allegedly interfered with a witness that had filed a complaint with the JCC. The county attorney began an investigation of witness tampering. JCC dismissed the complaints, however, and, because of confidentiality requirements, disclosed very little to the county attorney who was trying to make a case for witness intimidation. H.B. 285 enacted in 2000 now requires the JCC to disclose alleged criminal misconduct to the local prosecuting attorney. In this case, one could say that the system worked and the judge is off the bench. Others will say the system did not work and he is off the bench.

In another case, a judge said he would resign if the JCC dropped the charges against him. All complaints were dismissed, but the JCC reopened the complaints against him when they found he did not resign. However, one month later, the JCC dismissed the complaints for lack of sufficient evidence. It is unclear how the commission came to the conclusion that there was insufficient evidence since they had previously stated there was sufficient evidence.

In another case, complaints were dismissed when the judge left office. In the dismissal letter to the judge the commission wrote “in harmony with most other states, it is the JCC's policy that allegations are not pursued if the accused judge leaves office before formal proceedings are commenced.” Although formal proceedings had been commenced in connection with these complaints, the commission concluded that “no appreciable benefit would be achieved by conducting a formal hearing in these cases.”

Although charges were dropped in the above three cases, two other judges received public censures after their resignations. These examples show inconsistent treatment of misconduct decisions.

#### **Decisions on Number of Sanctions Given to a Judge Is Unclear.**

In 2002, the commission received two complaints and concluded that the judge violated the Code of Judicial Conduct three times. The commission unanimously voted to give the judge an informal reprimand for each violation instead of combining all three and giving a stiffer sanction. The judge and his attorney proposed one private reprimand for the three violations. It is unclear why the commission decided to give three informal reprimands. Around the same time, the commission gave one private reprimand to a judge for injudicious actions on four separate occasions.

**Varied Decisions Are Reached by Different Commissions.** In a recent Utah proceeding, Utah's Commission gave a private reprimand to a judge pro tempore for representing a litigant in bankruptcy proceedings. In contrast, the Tennessee Court of the Judiciary censured a part-time judge and suspended him for 60 days without pay for representing a litigant in a case pending before him in a bankruptcy that affected the pending case. The Court stayed the suspension pending the judge's effort to comply with several conditions and stated that it would dismiss the suspension upon successful completion of the conditions within certain time limits. One of the conditions requires the judge to formulate a procedure for reviewing the judge's general sessions docket before accepting employment as an attorney, in order to avoid conflicts of interest.

**Some Judges Hire Attorneys to Represent Them Before the JCC.** Some judges, accused of misconduct, are unfamiliar with the workings of the JCC and hire attorneys to represent them. Sometimes they hire former Bar Commissioners or former JCC Commissioners to represent them, possibly giving them advantage with acting commissioners. JCC rules require that commission members do not represent judges for two years once they are off of the commission. This two-year rule was enacted in 2000. Prior to that, there was no rule against hiring a former commissioner.

## **Recommendations**

1. We recommend that the commission prepare detailed written decisions that logically link factual findings and legal conclusions to the recommended sanction orders. Dissenting opinions should also be clearly documented.
2. We recommend that the JCC and the court determine applicable standards for determining the appropriate sanction and what is meant by a "pattern" of misconduct, whether prior informal or private resolutions of complaints may be considered in subsequent proceedings, and what weight should be accorded the judge's record.
3. We recommend that the JCC and the Legislature work together to establish guidelines for the use of informal reprimands.



4. We recommend that JCC staff enter all complaint information into a confidential database that can be used to provide relevant information to Commissioners and to the Supreme Court when requested.

## **Chapter IV**

### **Supreme Court Has Role In Judicial Discipline**

---

**The Utah Constitution requires Supreme Court review of all misconduct cases prior to imposition of discipline. The Supreme Court does not review dismissals.**

---

Supreme Court review of judicial misconduct cases and imposition of discipline upon judges is required by the Utah Constitution. Prior to 2000, the Commission believed it was required to only send public reprimand orders to the Supreme Court. Many of its orders were therefore not subject to Supreme Court review. Since May 2000, the JCC is now required to send all reprimand orders to the Supreme Court. The confidentiality of cases after the Supreme Court review depends on whether the case was resolved formally or informally. Part of the purpose of judicial discipline is to deter other judges and to reassure the public that the judiciary does not tolerate judicial misconduct. This assurance cannot happen when most things are confidential and that which is not confidential is very brief and not readily accessible.

### **Supreme Court Has Not Received All Misconduct Cases From JCC**

The Utah Constitution gives the Supreme Court complete discretion to issue the appropriate sanction in misconduct cases. However, in the past, the Commission resolved many judicial misconduct cases without sending the case to the Supreme Court. By not forwarding the cases to the Supreme Court, the judicial misconduct machinery has been sidestepped. Figure 8 shows all sanctions imposed on Utah judges by the Supreme Court.

**Figure 8. Number of Sanctions Implemented by the Utah Supreme Court.** Since 7/1/97 the Supreme Court has implemented 29 various sanctions against Utah Judges.

<b>Sanction Imposed</b>	<b>FY 97</b>	<b>FY 98</b>	<b>FY 99</b>	<b>FY 00</b>	<b>FY 01</b>	<b>FY 02</b>	<b>FY 03</b>	<b>Total</b>
<b>Public Actions:</b>								
Stipulated Public Censure	1		3	1				5
Public Reprimand		1		1	1			3
Stipulated Public Reprimand	3	2	1		1		1	8
<b>Total Public Actions</b>	<b>4</b>	<b>3</b>	<b>4</b>	<b>2</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>16</b>
<b>Private Actions:</b>								
Informal Reprimand					1			1
Stipulated Informal Reprimand					2	5	5	12
<b>Total Private Actions</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>5</b>	<b>5</b>	<b>13</b>
<b>Total Sanctions</b>	<b>4</b>	<b>3</b>	<b>4</b>	<b>2</b>	<b>5</b>	<b>5</b>	<b>6</b>	<b>29</b>

Figure 8 shows the number and type of sanctions implemented by the Supreme Court since Fiscal Year 1997. It also shows that beginning in Fiscal Year 2001, the JCC began forwarding private reprimands to the Supreme Court as required by H.B. 285. An informal order of reprimand is a form of non-public discipline, and disclosure is limited by statute to the person who filed the complaint; the judge who is the subject of the complaint; the Judicial Council; the Supreme Court; and the appointing entity. The private reprimand may be publicly disclosed with the written consent of the judge.

### **Supreme Court Has Complete Constitutional Authority to Determine Appropriate Sanction**

Utah Constitution Article VIII, Section 13, gives the Supreme Court complete discretion to accept, reject or modify the Commission's proposed order of sanction. The Utah Constitution reads, "After its

---

JCC resolved fifteen cases without forwarding them to the Supreme Court thereby usurping the Supreme Court authority to implement, reject or modify the commission's order.

---

review, the Supreme Court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order."

The Supreme Court determined the applicable standard of review for judicial conduct cases stating *In re Worthen*:

In sum, we will not overturn the Commission's findings of fact unless they are arbitrary, capricious, or plainly in error, but we reserve the right to draw inferences from the basic facts which may differ from the Commission's inferences and grant no deference to the Commission's ultimate decision as to what constitutes an appropriate sanction.

Further clarification came from H.B. 285 in the 2000 session which provided that all Commission orders, whether formal or informal, must be reviewed by the Utah Supreme Court as to both law and fact. After reviewing a proposed Commission order, the Supreme Court either implements, modifies, or rejects the order.

### **JCC Did Not Send Some Cases to the Supreme Court**

Prior to the year 2000 changes in statute, the Commission, after determining that there was misconduct, resolved fifteen cases that were not submitted to the Supreme Court for implementation. Six of the cases were termed "informal reprimands" and nine were "informal resolutions". However, the case files show that the commission found misconduct in each of the cases. In our opinion, informally resolving these cases at the Commission level amounted to usurping the Supreme Court's authority to review and implement appropriate sanctions.

Also, prior to the year 2000, the commission dismissed 30 complaints but sent letters to the judges informing them of the complaint and the action taken. The cases include:

- 4 dismissals with admonition
- 18 dismissals with caution
- 8 dismissals with comment

It is unclear if a dismissal with action needs Supreme Court review. However, by not submitting these cases to the Supreme Court, the court

did not have the opportunity to review the case and implement, reject or modify the commission's action.

The Supreme Court has made it clear that they provide a check on the commission as they note in the *In Re Worthen* decision:

This standard of review will provide the necessary flexibility to address the concerns of those courts that employ a less-deferential standard of review in judicial misconduct proceedings—viz.,

- (i) providing a check on an errant commission, and
- (ii) discharging the court's ultimate responsibility of imposing an appropriate sanction without demeaning the Commission's role in the judicial discipline process.

## **Supreme Court Guidance May Be Necessary**

The majority of Commission orders sent to the Supreme Court were stipulated agreements where the Commission and the judge had already agreed to a resolution. There was no unresolved conflict in the cases and, therefore, the Supreme Court did not have to issue opinions on these cases. The court implemented the Commission's suggested orders without comment. The court has only provided written opinions in three cases and, therefore, the Commission does not have much Utah case law to help them with future cases. Several issues have not yet been resolved by the Supreme Court.

### **Supreme Court Has Implemented Most Commission Orders Without Comment**

Before H.B. 136 passed in May 2002, there were concerns that the Supreme Court may have been hindered in performing their constitutional duty because most cases were stipulated by the commission and the judge, because the Supreme Court lacked information from the commission, and because of binding language in the settlement stipulations. However, the Supreme Court has the constitutional authority to implement, reject or modify commission orders.

**Most Misconduct Orders to the Supreme Court Were Stipulated by the Judge and the Commission.** Most judicial misconduct cases have been resolved between the Commission and the judge and have been sent

---

**Most Supreme Court orders have been issued without comment because most JCC orders were stipulated between the JCC and judge.**

---

to the Supreme Court for review. In three cases there was unresolved conflict between the judge and the Commission, and that conflict was resolved by the Supreme Court in written opinions. Most cases did not have any unresolved conflict, and, therefore, the Supreme Court did not issue any formal opinions. The three cases where the Supreme Court issued an opinion are as follows:

- *In re Richard Worthen and In re Gaylen Buckley* was filed October 22, 1996. Two cases went before the Supreme Court where the Commission had entered an order imposing sanctions against Utah judges, and the judges had challenged the Commission's action. As a result, the court was called upon to construe the relevant constitutional and statutory provisions and to scrutinize the Commission's conduct of its business. The Court decision provided detailed guidance for Commission procedures.
- *In re McCully* was the second Supreme Court case where an opinion was issued. It went before the Supreme Court on the motion of the judge that asked the court to reverse the Commission's order recommending that she be publicly reprimanded.
- *In re Young*, the Supreme Court issued three opinions on this matter. The judge in the case raised a significant constitutional issue of whether the presence of legislators on the Commission violates the distribution of powers clause (Article 5, Section 1) of the Utah Constitution. Two opinions were issued regarding the Commission's makeup. In the second opinion, the court held that the Commission's makeup does not run afoul of the separation of powers provision. The court then addressed the judge's challenges to the Commission's findings and proposed sanction. The court ordered the public reprimand of the judge because they found that he had engaged in conduct prejudicial to the administration of justice which brought the judicial office into disrepute in violation of **Utah Code** and breached two sections of the Code of Judicial Conduct.

---

The JCC may have hindered the Supreme Court by including language in the settlement stipulations.

---

**JCC Included Language in Settlement Stipulations to Bind the Supreme Court.** For several years, the Commission routinely put language in the Settlement Stipulation stating that the "stipulation would become void if the Utah Supreme Court refuses to implement or chooses to modify the Commission's Findings of Fact, Conclusions of Law, and Order." There was some concern that the Supreme Court may have been

---

**JCC supplied little information to the Supreme Court thereby hindering the court.**

---

hindered in deciding whether a recommended sanction by the Commission was the proper sanction because of the lack of information provided to the court. There was also a concern that the Supreme Court was bound by a sentence in the stipulations stating that the stipulation would be void if changed by the court. The court was not constitutionally bound by the JCC. The Commission indicated it has stopped putting this sentence in Settlement Stipulations.

**JCC Provided Little Information to the Supreme Court.** Some concerns have been raised that the Utah Supreme Court was hindered in deciding whether a recommended sanction by the Commission was the proper sanction because very little information was supplied to the Court. The Commission routinely put very brief facts in their Findings of Fact and Conclusions of Law. The concern was that without all the facts, the Supreme Court could not reasonably be expected to fulfill its constitutional duty to implement, reject, or modify the Commission's recommended order. Changes were made by H.B. 136 in the 2002 General Session to address this problem.

In a recent case, the Commission sent so little information to the Supreme Court that in January 2002, the court issued an order "declining to act on the Commission's recommendation" and directed the Commission "to submit sufficient facts to permit the court to evaluate the appropriateness of the recommended discipline." In March 2002, the Supreme Court ordered the Commission to submit a list of 11 categories of documents to the court. In November 2002, the Supreme Court issued another order requesting all parties to appear before a special master stating "the court has reviewed the proceedings and is not entirely satisfied the recommendation of the Commission serves the necessary interests of justice for the complaining parties, due process and justice for the accused judge, and protection of the public and the judiciary." The Supreme Court's final order implementing the JCC recommended discipline was released in March 2003.

Prior to H.B. 136, the Commission provided little information to the Supreme Court. There was no historical document showing what had happened. In *re Worthen*, the Supreme Court provided, to the Commission a fairly detailed list of items to be submitted when submitting orders to the Supreme Court. This requirement was not implemented until the list was formally put into statute by H.B. 136 which became effective May 2002.

In June 2002, the new Executive Director of the Commission created a checklist for submission of orders to the Utah Supreme Court and includes the following as available:

- a copy of the original complaint
- a summary of any other information regarding violations, or potential violations, of the Code of Judicial Conduct (raised or discovered in this proceeding)
- a copy of the notice of formal charges
- copies of all correspondence and other documents which passed between the commission and the judge (and/or the judge's attorney)
- copies of all letters which may explain the charges
- copies of all affidavits, subpoenas, and testimony of witnesses
- a copy of the commission's Findings of Facts and Conclusion of Law
- transcripts of all proceedings, including hearings on motions
- transcript of the evidence
- a summary of all the complaints dismissed by the commission against the judge which contained allegations or information similar in nature to the misconduct under review by the Supreme Court in the present matter.
- a summary of all the orders previously implemented, rejected, or modified by the Supreme Court against the judge.
- all information in the commission's files on any informal resolution (including any letter of admonition, comment, or caution) that the commission issued against the judge prior to May 1, 2000.

### **Some Issues May Need Supreme Court Action in the Future**

There are a number of issues that may need clarification either through legislation or the judicial process. Judges responses include statements citing questions of clarification and jurisdiction. Without legislative action the Supreme Court may be called on to rule on the following issues:

- Whether the Commission's one-tier system violates a judge's due-process rights.
- Whether the Commission has jurisdiction over pre-appointment misconduct.
- Whether the Commission has jurisdiction over former judges whose misconduct occurred while they held office.

---

**There are some issues that need clarification either through legislation or the judicial process.**

---



## Deterrence and Public Reassurance Have Become Secondary Goals

Sanctions against judges in Utah are not widely publicized. The Supreme Court issues the order and the information goes to the Commission and others identified in statute. Paper orders are maintained in the clerk's office of the Supreme Court. According to the AJS:

Finally, because part of the purpose of judicial discipline is to deter other judges and to reassure the public that the judiciary does not tolerate judicial misconduct, court decisions imposing public sanctions should clearly explain the misconduct that gave rise to the sanction (not simply refer to the commission recommendation and findings) and should be treated as other important decisions by the court and be available on a web-site, in the court's official reporter, and in the regional reporter. Commission decisions should also be available on-line. Many commissions have already begun to make their decisions available on web-sites.  
([www.ajs.org/ethics/ethconduct-orgs.asp](http://www.ajs.org/ethics/ethconduct-orgs.asp))

Publicizing sanctions against judges in the *Pacific Reporter* or on the Supreme Court's home page would provide needed information to the public. Some other states put sanctions on the Web and in the *Pacific Reporter*.

## Recommendations

1. We recommend that the Supreme Court consider treating sanctions against judges as it does its other decisions and make the information available on the web-site, in the court's official reporter, and in the regional reporter.
2. We recommend that the Supreme Court, in imposing a sanction, consider articulating the factors leading to its decision, particularly if the court disagrees with the sanction recommended by the commission.
3. We recommend that the JCC forward all misconduct cases to the Supreme Court so that the court may implement the appropriate sanction as required by the constitution.

4. We recommend that the JCC not put anything in Settlement Stipulations that would bind the Supreme Court.
5. We recommend that the JCC provide the Supreme Court with complete information on misconduct cases so that the court can fulfill their constitutional authority to implement, reject or modify the commission's recommended order.

**This Page Left Blank Intentionally**

## **Appendices**

**This Page Left Blank Intentionally**

## **APPENDIX A**

### **Judicial Council Rules of Judicial Administration Code of Judicial Conduct**

**This Page Left Blank Intentionally**

# **Appendix A**

## **JUDICIAL COUNCIL RULES OF JUDICIAL ADMINISTRATION**

### **CODE OF JUDICIAL CONDUCT**

#### **Terminology**

"Candidate" means a non-judge seeking selection for judicial office, or a judge seeking selection for or retention in judicial or non-judicial office. A person becomes a candidate as soon as the person makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support, whichever occurs first.

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

- (i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;
- (ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization, does not create an economic interest in securities held by that organization;
- (iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;
- (iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

"Family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.



"Judge Pro Tempore." A judge pro tempore is a lawyer who is serving as a specially appointed judge pro tempore pursuant to Utah Code Ann. § 78-6-1.5 or Article VIII, § 4 of the Utah Constitution.

"May" denotes discretionary conduct or conduct that is not covered by specific proscriptions.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"Shall" and "shall not" impose binding obligations to respectively engage in or refrain from the described conduct. The failure to act in accordance with those obligations can result in disciplinary action.

"Should" and "should not" are used to indicate conduct that is respectively encouraged or discouraged. The failure to engage in or refrain from such conduct cannot result in disciplinary action.

"Third degree of relationship" denotes the following relatives: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

### **Canon 1. A judge shall uphold the integrity and independence of the judiciary.**

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

### **Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all activities.**

A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

C. A judge shall not belong to any organization, other than a religious organization, which practices invidious discrimination on the basis of race, sex, religion, or national origin.

**Canon 3. A judge shall perform the duties of the office impartially and diligently.**

A. Judicial duties in general. The judicial duties of a full-time judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative responsibilities.

- (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.
- (2) A judge shall apply the law and maintain professional competence. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
- (3) A judge should maintain order and decorum in proceedings before the judge.
- (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.
- (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and should not permit, and shall use all reasonable efforts to deter, staff, court officials and others subject to judicial direction and control from doing so. A judge should be alert to avoid behavior that may be perceived as prejudicial.
- (6) A judge should require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.
- (7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the

record, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. A judge should require similar abstention on the part of court personnel subject to judicial direction and control. This Canon does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court. This Canon does not apply to proceedings in which a judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for purposes unrelated to judicial duties, information acquired in a judicial capacity that is not available to the public.

#### C. Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments, shall exercise the power of appointment impartially and on the basis of merit, and shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary responsibilities. A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. This section does not apply to information generated and communicated under the policies of the Judicial Performance Evaluation Program.

#### E. Disqualification.

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and should make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of disqualification. A judge disqualified by the terms of Canon 3E may disclose the basis of the judge's disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge need not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be entered on the record, or if written, filed in the case file.

**Canon 4. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**

A. Extra-judicial activities in general. A judge shall conduct the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office;

(3) interfere with the proper performance of judicial duties; or

(4) exploit the judge's judicial position.

B. Avocational activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal topics subject to the requirements of this Code.

C. Governmental, civic, or charitable activities.

(1) (a) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system, or the administration of justice, or except when acting pro se in a matter involving the judge or the judge's interests.

(b) A judge shall not use the judge's judicial office or title to influence a legislative or executive body or official for the judge or the judge's interest.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency, which may include a constitutional revision commission, devoted to the improvement of the law, the legal system or the administration of justice, or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization will be frequently engaged in adversary proceedings before any court.

(b) A judge, as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fund-raising mechanism, except as permitted in Canon 4C(3)(b)(i);

(iv) shall not use or permit the use of the prestige of the judicial office for fund-raising or membership solicitation;

(v) shall not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events.

#### D. Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position; or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) [Reserved.]

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest those investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and should urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the non-judicial business or profession of a part-time judge or the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge, provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend for a special occasion, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Canon 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants;

(h) [Reserved.]

#### E. Fiduciary activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as arbitrator or mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

#### H. Compensation and reimbursement.

(1) A judge may receive compensation and reimbursement of expenses for extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person of like education and expertise who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(c) A judge should not receive compensation for performing a marriage ceremony at the court during regular court hours. A judge may receive compensation for performing a marriage ceremony during non-court hours.

(2) [Reserved.]

I. [Reserved.]

**Canon 5. A Judge Shall Refrain from Political Activity Inappropriate to the Judicial Office.**

A. A candidate for selection by a judicial nominating commission shall not engage in political activities that would jeopardize the confidence of the public or of governmental officials in the political impartiality of the judicial branch of government. A candidate for selection to a judicial office shall not:

- (1) misrepresent the candidate's identity, qualifications, present position, education, prior experience or any other fact;
- (2) make promises or pledges of conduct in office other than the faithful, impartial and diligent performance of judicial duties; or
- (3) seek support or invite opposition to the candidacy because of membership in a political party.

B. A judge or a candidate for a judicial office who has been confirmed by the Senate shall not:

- (1) act as a leader or hold any office in a political organization;
- (2) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
- (3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings or purchase tickets for political party dinners or other functions, except as authorized in Canon 5C; or
- (4) take a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system.

C. If a candidate for judicial office in a retention election or reappointment process has drawn active public opposition, the candidate may operate a campaign for office subject to the following limitations:

- (1) The candidate shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office or misrepresent the candidate's identity, qualifications, present position, or other facts.
- (2) The candidate shall not directly solicit or accept campaign funds or solicit publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. Committees may solicit campaign contributions and public statements of support from lawyers and non-lawyers. Surplus contributions held by the committee after the election shall be contributed without public attribution to the Utah Bar Foundation. Committees must not permit the use of campaign contributions for the private benefit of the judge or members of the judge's family.
- (3) The candidate may speak to public gatherings on the candidate's own behalf.



(4) A candidate may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Canon 5C(1).

(5) When a party or lawyer who made a contribution of \$50 or more to a judge's campaign committee appears in a case, the judge shall disclose the contribution to the parties. The requirement to disclose shall continue from the time the judge forms a campaign committee until 180 days after the general election.

D. Judges and candidates for judicial office:

(1) should maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and should encourage members of the judge's or candidate's family to adhere to the same standards of political conduct in support of the judge or candidate as apply to the judge or candidate;

(2) should discourage employees or officials subject to the judge's or candidate's direction and control from doing on the judge's or candidate's behalf what the judge or candidate is prohibited from doing under this Canon; and

(3) except to the extent permitted by Canon 5C(2), shall neither request nor encourage, and should not knowingly permit, any other person to do for the judge or candidate what the judge or candidate is prohibited from doing under this Canon.

E. A judge shall resign from judicial office upon becoming a candidate for non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention.

F. A lawyer who is an unsuccessful candidate for judicial office is subject to lawyer discipline for violations of this Canon pursuant to Rule of Professional Conduct 8.2.

## **APPENDIX B**

### **Order**

THE UTAH SUPREME COURT

---ooOoo--

In Re:           Legislative Audit of  
          Judicial Conduct  
          Commission

Case No. 20021046-SC

ORDER

Pursuant to a stipulation agreed to by Wayne Welch, Legislative Auditor General and Ruth Lybbert, Chair of the Judicial Conduct Commission, dated December 8, 2002, the Court hereby orders:

Subject to the conditions listed below, the Judicial Conduct Commission ("Commission") shall provide to the Office of the Legislative Auditor General ("Legislative Auditor") access to all Commission documents pertaining to judicial conduct files closed within the past five years including complaints, supporting documentation, confidential minutes of meetings and hearings, and other related documents ("Commission documents")

1.       The Legislative Auditor is permitted access to Commission documents only for the purpose of conducting the audit of Commission practices as authorized by the Audit Subcommittee of the Legislative Management Committee on January 29, 2002, pursuant to UTAH CODE ANN. § 36-12-15 (2001)
2.       As described below in paragraphs 3 and 4, the Legislative Auditor shall have access to all Commission documents:
  - . without redaction or other alteration;
  - . at the offices of the Commission; and

- at times mutually agreed to by the Executive Director of the Commission ("Executive Director") and the Legislative Auditor.
3. The Legislative Auditor may not remove any Commission document from the offices of the Commission, except that the Legislative Auditor may obtain a copy of any Commission document after the document is redacted of specific information that would easily identify any judge, witness, or complainant. At the discretion of the Executive Director, Commission documents may be redacted by either the Commission staff or the Legislative Auditor. If a Commission document is redacted by the Legislative Auditor, the Legislative Auditor shall provide a copy of any document as redacted to the Executive Director.
  4. When examining Commission documents at the offices of the Commission, the Legislative Auditor may take notes or create composite documents if the notes or composite documents do not contain specific information that would easily identify a judge, witness, or complainant. The Legislative Auditor may remove from the Commission office such notes or composite documents. The Legislative Auditor shall provide a copy of any notes or composite documents to the Executive Director.
  5. Except for information that has already been made public, the final written and oral audit report will contain no specific information that would easily identify a judge, witness, or complainant.
  6. The Legislative Auditor agrees to provide the same restrictions and protections to Commission records as provided in UTAH CODE ANN. Title 63, Chapter 2 (2002), UTAH CONST. ART. VIII § 13, and UTAH CONST. ART. VI. § 33.

For The Court:

MAILING CERTIFICATE

Christine M. Durham  
Chief Justice

MAILING CERTIFICATE

I certify that on the 27th day of December 2002, I mailed a true and correct copy of the foregoing Order, postage prepaid, to the following addresses:

Cohn Winchester  
Executive Director  
Judicial Conduct Commission  
645 South 200 East, Suite 104  
Salt Lake City, Utah 84111

Ms. Ruth Lybbert, Chairman  
Judicial Conduct Commission  
645 South 200 East, Suite 104  
Salt Lake City, Utah  
84111-3834

MAILING CERTIFICATE

M. Gay Taylor, General Counsel  
Office of Legislative Research & General Counsel  
P.O. Box 140121  
Salt Lake City, Utah 84114-1021

Wayne L. Welsh, CPA  
Legislative Auditor General  
P.O. Box 140151  
Salt Lake City, Utah 84114-0151

Jerry Howe, Esq  
Office of Legislative Research & General Counsel  
P.O. Box 140121  
Salt Lake City, Utah 84114-1021

Date

Pat H. Bartholomew  
Clerk of Court

**This Page Left Blank Intentionally**

---

## **Agency Response**





Colin R. Winchester  
Executive Director

# State of Utah

## JUDICIAL CONDUCT COMMISSION

645 South 200 East #104  
Salt Lake City, Utah 84111  
Telephone: (801) 533-3200  
Facsimile: (801) 533-3208

December 9, 2003

Wayne L. Welsh, CPA  
Utah Legislative Auditor General  
130 State Capitol  
Salt Lake City, Utah 84114

Dear Mr. Welsh:

Thank you for the opportunity to review and provide an agency response to the Performance Audit of the Judicial Conduct Commission.

### **INTRODUCTION**

Prior to November 11, 2003, Audit Manager Tim Osterstock and Audit Supervisor Maria Stahla met with Judicial Conduct Commission ("JCC") executive director Colin Winchester to review a pre-exposure draft of the audit report. As a result, several modifications were incorporated into the exposure draft.

Mr. Osterstock and Ms. Stahla then met with the JCC and its staff on November 11, 2003 to review the exposure draft. The exposure draft was favorably received. A few minor changes were suggested, and they have been incorporated into the final draft.

This letter constitutes the JCC's agency response to the final draft. Although the JCC has not met since November 11, this letter has been circulated among and approved by a majority of the JCC Commissioners.

First and foremost, I wish to acknowledge and express my appreciation for the professionalism of your staff in arranging and conducting the audit. As you know, Ms. Stahla spent several months onsite reviewing the 552 casefiles included in the audit. Largely due to her prudence and care, confidential information has been appropriately safeguarded. In addition, Ms. Stahla's contribution to the JCC's newly created electronic database, into which all past and current JCC matters are

now being entered, has been invaluable. Mr. Osterstock's and Ms. Stahla's efforts have been significant. Moreover, they have both been accessible and responsive to the JCC's concerns throughout the audit investigation and drafting processes.

The audit raises four general concerns, each of which is addressed below.

### **RESPONSES TO AUDIT RECOMMENDATIONS**

<b><i>General Recommendation</i></b>	<b><i>The JCC's procedural rules should be expanded and improved.</i></b>
--	---

The JCC's current rules are located at Utah Administrative Rules 595-1-1 through 595-1-20. The current scheme of the rules, in effect since October 2000, is patterned after the American Bar Association's Model Rules for Judicial Disciplinary Enforcement (1994 edition). Utah's rules differ from the ABA's model where necessary to conform to Utah's unique constitutional and statutory provisions.

Current rules review process. In July 2002, JCC membership was significantly changed as a result of H.B. 136. Just one month before that, the JCC had appointed a new executive director. As the new commissioners and new executive director used and became familiar with the existing procedures, it became apparent that the existing rules – all adopted before the 2002 reorganization of the JCC - were inadequate in several respects. After the Legislature's 2003 general session, the JCC began a process to review and re-write its existing rules. That process is progressing and will continue until completed. The review process is focusing on many of the specific issues identified in the audit report, including: delineation of the tasks that may occur in a preliminary investigation; an appeal process for dismissals; a requirement that all dismissals and decisions to move cases to the next level be approved by the JCC (as is the current practice); and a uniform process for resolving complaints in light of the resignation or retirement of a subject judge.

**General  
Recommendation**

***The JCC should provide more information to prospective and actual complainants, the public, judges and court employees.***

JCC website. The JCC's website currently lists the names of JCC commissioners and the executive director, provides contact information for the JCC office, offers an electronic complaint form, and contains links to pertinent statutes, rules and judicial ethics opinions. For several months, the website has indicated that a frequently asked questions (FAQs) section would be added, but that has not yet been accomplished. The current website does not contain the JCC's annual reports. Nor does it contain a historical list of all sanctions imposed by the JCC or the Supreme Court. All of these will be helpful additions and will be added to the JCC's website.

Educational efforts. The JCC and staff provide instruction and information to judges, court employees and bar members upon invitation. This interaction has been extremely beneficial, and will be continued as requested. The JCC and staff also respond to press inquiries when such responses do not violate confidentiality requirements. Finally, the JCC and staff are willing to provide information to the public upon request.

Annual reports. The JCC's annual reports, though brief, contain appropriate information regarding the JCC's annual operations and actions. Annual reports are distributed to all judges, all legislators, the governor, various state commissions involved in the justice process, the Utah State Bar's Office of Professional Conduct, various state court administrators, the American Judicature Society, all other states' judicial disciplinary organizations, leading daily newspapers throughout the state, and others upon request. This practice will continue. As mentioned, future annual reports will also be made available on the JCC's website.

Informational brochure. Distribution of the JCC's existing informational brochure, a copy of which was provided to all individuals who requested a complaint form, has been discontinued. A new, more accurate, brochure is being prepared, and upon completion, will be distributed to all such individuals in the future.

**General Recommendation**      ***JCC documents should be clearly written and should contain sufficient information.***

It is the standard of the JCC and staff to generate clear, concise and legally sufficient documents. As pointed out by the audit report, that standard has not always been met.

Dismissal letters. Most complaints are dismissed either because the preliminary investigation fails to produce sufficient facts to merit further proceedings, or because the complaint challenges a judge's legal rulings. Staff has developed two basic form letters, one for each stated reason, and sends the appropriate form letter upon dismissal of a complaint by the JCC. When the dismissal is for any other reason, or when a form letter is deemed inadequate for any other reason, staff prepares and sends an individualized letter. The two form letters do not contain details about the investigation or legal reasoning. The previous executive director once attempted to use detailed letters, only to find that such letters were perceived by complainants as invitations to argue that the investigation was inadequate or that the investigator failed to properly analyze the pertinent provisions of the Code of Judicial Conduct. Consequently, the use of detailed dismissal letters was discontinued. Despite having been told of that experiment, the new executive director also attempted, on a handful of occasions, to use detailed letters, only to independently determine that the use of detailed dismissal letters is problematic.

Charging documents. The JCC believes that current charging documents contain appropriate and sufficient factual allegations, and appropriate identification of the applicable canons and legal issues. The JCC will continue to prepare and utilize charging documents that meet these standards.

Orders imposing sanctions. Most JCC orders imposing judicial discipline have not contained an adequate explanation of the link between the misconduct found and the sanction imposed. The JCC will endeavor to include more detailed explanations in all future documents imposing judicial discipline.

Wayne L. Welsh, CPA  
Utah Legislative Auditor General  
December 9, 2003  
Page Five

***General Recommendation                      The JCC should strive to achieve consistency in the imposition of sanctions.***

As the audit report indicates, the JCC adopted sanctions guidelines in February 1996. Those guidelines are still in effect, and are being reviewed as part of the rules revision process noted above.

In order to determine an appropriate sanction, guidelines should be considered in each and every case in which misconduct is found. However, the JCC recognizes that differences exist among each given set of facts, and submits that guidelines must neither be drafted nor interpreted in such a way as to eliminate the JCC's ability and discretion to arrive at an appropriate sanction upon full consideration and deliberation. The JCC believes that sanctions recommended by the current JCC have been appropriate in light of the misconduct found and the application of the guidelines.

**CONCLUSION**

Again, thank you for the opportunity to respond to the audit report and comment upon the activities and progress of the JCC. If you have questions or concerns about this response, or if additional information is needed, please contact Colin Winchester or me.

Sincerely,

Ruth Lybbert  
Chair